Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

SPHERE DRAKE UNDERWRITING MANAGEMENT LTD.,
Petitioner,

v.

ROYAL INSURANCE COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

GEO. MICHAEL JAMAIL
Counsel of Record
THE REAUD LAW FIRM
801 Laurel Street
P.O. Box 26005
Beaumont, Texas 77720-6005
(409) 838-1000
(409) 813-1325 (facsimile)

Counsel for Petitioner

Alpha Law Brief Company, Houston, Texas (713) 270 - 6604

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QUESTION PRESENTED FOR REVIEW

1. Whether *Fitzgerald v. United States* and *Calmar S.S. Corp. v Taylor* prevent a maritime employer from artificially characterizing an extraordinarily large amount of Jones Act settlement monies as an outlay of future cure.

2. Whether a maritime excess insuror can artificially characterize an extraordinary amount of a Jones Act settlement as future cure as a means to derogate the primary insuror's interest in recouped maintenance and cure monies.

3. Whether the maritime proportionate share rule of *McDermott v. AmClyde* and the rule barring maritime contribution claims in *Boca Grande Club, Inc. v. Florida Power & Light Co.* prohibit the artificial characterization of an extraordinarily large amount of Jones Act settlement monies as future cure.

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Sphere Drake Underwriting Management Ltd. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

On October 12, 2000, the Supreme Court of the State of Texas denied the Petition for Review [as corrected] filed by Sphere Drake Underwriting Management Ltd. Case No. 99-1312, *Sphere Drake Underwriting Management Ltd. v. Royal Insurance Company of America* (Appendix A).

On November 18, 1999, the Ninth Court of Appeals overruled Appellee's Second Motion for Rehearing, Case No. 09-97-00485-CV, *Royal Insurance Company of America v. Sphere Drake Underwriting Management Ltd.* (Appendix B).

On September 30, 1999, the Ninth Court of Appeals at Beaumont, Texas rendered an opinion denying motion for rehearing. *Royal Insurance Company of America v. Sphere Drake Underwriting Management Ltd.*, 4 S.W.3d 378 (Tex. App.—Beaumont 1999, pet. denied). The published opinion is reproduced herein as Appendix C.

On August 26, 1999, the Ninth Court of Appeals at Beaumont, Texas rendered an opinion reversing the summary judgment of the trial court. *Royal Insurance Company of America v. Sphere Drake Underwriting Management Ltd.*, 997 S.W.2d 432 (Tex. App. — Beaumont 1999). The published opinion is reproduced herein as Appendix D.

On August 14, 1997, the 58th District Court of Jefferson County, Texas granted summary judgment in favor

of Sphere Drake Underwriting Management Ltd. Cause No. A-152,286-B, *Sphere Drake Underwriting Management Ltd. v. Royal Insurance Company of America* (Appendix E).

JURISDICTION

The order of the Supreme Court of Texas was filed on October 12, 2000. (App. A.) Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The Petition for a Writ of Certiorari is timely filed pursuant to 28 U.S.C. §§ 2101(c) and 2104.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Court has the constitutional and statutory authority to review the Texas court's decision. Relevant to this Court's empowerment are Article III, Section 2 of the United States Constitution, which provides, in pertinent part, "The judicial Power shall extend...to all Cases of admiralty and maritime Jurisdiction..."; and Section 1333 of 28 U.S.C., which provides, in pertinent part, "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

STATEMENT OF THE CASE

This case centers on the ramifications arising out of a maritime excess insuror characterizing $1.0 million of a $2.8 million "Jones Act" (46 U.S.C. § 688) settlement as "future cure". Why and how this "future cure" was paid is undisputed and evidenced by the following facts:

1. George Allemand ("Allemand") was a pushboat captain for Marine Fueling Service, Inc. ("Marine Fueling"). In June of 1995, Allemand incurred a maritime related injury when a hose coupling broke during a marine product transfer, showering him with sulfuric acid. Allemand sued Marine Fueling under the Jones Act, and also sued the manufacturer, seller, and user of the hose (the "Hose defendants"). This suit was filed in Texas state court.

2. Marine Fueling had a $1.0 million primary maritime liability policy with Sphere Drake Underwriting Management Ltd. ("Sphere Drake") and a $10.0 million maritime excess liability policy with Royal Insurance Company of America ("Royal").

3. As a result of Allemand's injuries, Marine Fueling was obligated by maritime law to pay maintenance and cure benefits.

4. Sphere Drake, as Marine Fueling's primary insuror, began funding Allemand's maintenance and cure.

5. From June 1995 until April 1996, and prior to Allemand settling his maritime negligence cases, a total of $1,065,072.37 in maintenance and cure was paid directly to Allemand and/or his health care providers; $933,995.79 of this outlay was paid by Sphere Drake and $131,076.58 was paid by Royal.

6. Once Sphere Drake had exhausted its $1.0 million policy limits, Royal, to the exclusion of Sphere Drake, assumed the active defense of the Allemand litigation.

7. In May 1996, Allemand settled his Jones Act claims against Marine Fueling for a total of $2.8 million. This $2.8 million was paid by Royal. When Royal settled Allemand's

case, Royal, on behalf of Marine Fueling, apportioned the settlement as follows: $1.8 million for settlement of Allemand's Jones Act claims and $1.0 million for future cure. Royal accomplished the apportionment by having Allemand sign a Jones Act release in exchange for $1.8 million and a future cure release in exchange for $1.0 million.

8. Contemporaneous with Marine Fueling's settlement, each of the Hose defendants settled Allemand's maritime negligence claims against them for additional amounts totaling more than $15.0 million.

9. During the course of the Allemand litigation, Marine Fueling had made a cross-claim seeking recoupment of its maintenance and cure outlay from the Hose defendants.

10. The Hose defendants settled Marine Fueling's claim for recoupment of its maintenance and cure outlay for $1.06 million.

11. Sphere Drake and Royal have subrogation rights to Marine Fueling's recouped $1.06 million because Sphere Drake and Royal funded Marine Fueling's maintenance and cure outlay.

12. The maritime issue presented to the Texas courts was how to apportion Marine Fueling's recouped maintenance and cure monies between Sphere Drake and Royal.

13. The trial court applied maritime law and held that Sphere Drake and Royal should share the recouped monies on a pro-rata basis as follows: $923,042.00 to Sphere Drake and $129,458.00 to Royal. This was based on the fact that prior to Allemand settling any of his maritime negligence claims Sphere Drake funded 87.2% and Royal funded 12.8%

of the maintenance and cure outlay Marine Fueling actually paid to Allemand and/or his health care providers.

14. In two published opinions, the intermediate Texas appellate court reversed the Texas trial court and rendered judgment that Royal recover 100% of the recouped monies. This decision was premised on the Texas appellate court deeming Royal's $1.0 million recital of future cure to be an actual cure outlay, thereby triggering the subrogation clause in Royal's policy, which stated that Royal would receive the first subrogated monies recovered. (App. C; App. D.)

15. The Texas Supreme Court affirmed the appellate court decisions. (App. A.)

REASONS FOR GRANTING THE WRIT

Whether Jones Act settlement monies can be characterized as future cure is a question to be governed by federal maritime law.

The Texas Supreme Court affirmed the Court of Appeals decision, which stated:

> The only matter before this court is Sphere Drake's dispute with Royal over which insurance company recovers monies recouped from a third-party tortfeasor—not a maritime matter....[t]he facts of this case do not "come within the purview of maritime law."

Royal Insurance Company of America v. Sphere Drake Underwriting Management Ltd., 4 S.W.3d 378, 379-80 (Tex. App.—Beaumont 1999, pet. denied). (App. C, p. 8a) The Texas courts are not in harmony with federal law.

Texas courts cannot create maritime remedies which are antagonistic with the current body of federal maritime law. The direct and indirect consequences of an excess insuror being able to artificially characterize $1.0 million of a $2.8 million Jones Act settlement as future cure is a matter of utmost importance to maritime litigation.

When the maritime excess insuror, Royal, on behalf of Marine Fueling, settled Allemand's Jones Act claims for $2.8 million, Royal was obligated to fund the settlement in accordance with maritime law. Under maritime law Marine Fueling had no substantive right to a contribution claim against its co-defendants. Accordingly, Marine Fueling had no substantive right under maritime law to recoup any of its $2.8 million Jones Act settlement. Since under maritime law Marine Fueling had no right to recoup any of its settlement outlay, Royal likewise had no right to recoup any of the Jones Act settlement monies Royal paid on behalf of Marine Fueling. *Pacific Employers Ins. Co. v. M/V Capt. W.D. Cargill*, 751 F.2d 801 (5th Cir. 1985), *cert. denied*, 474 U.S. 909 (1985). The Texas court disregarded the reverse-*Erie* doctrine and applied Texas law instead of maritime law to these maintenance and cure based issues. *Contra, Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), *rehearing denied*, 349 U.S. 907 (1955).

Royal's conduct and aims insofar as they pertained to artificially characterizing $1.0 million of the $2.8 million settlement as future cure were directly contrary to maintenance and cure holdings of two U.S. Supreme Court cases. *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963); and *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938).

The Texas court's judgment is erroneous because it ignores the *Fitzgerald* rule that a maritime employee's cure

claim is subsumed by the employee's settlement of his Jones Act and/or maritime negligence claims. The Texas court's judgment is erroneous because, contrary to *Calmar*, it allows an extraordinarily large future cure outlay to be created by a mere recital in a general maritime negligence release.

The Texas court's judgment is also irreconcilable with the proportionate share rule because if an artificial future cure creation is allowed, a maritime employer can then defray its Jones Act outlay under the guise of a maintenance and cure recoupment claim against its joint tortfeasors. *Contra, McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994); *Boca Grande Club, Inc. v. Florida Power & Light Co.*, 511 U.S. 222 (1994).

The Supreme Court should grant this petition because the nature and extent of a maritime employer's maintenance and cure claim is common to all Jones Act cases. How issues subsidiary to any recoupment claim are constrained by federal law barring maritime contribution claims goes to the essence of this case. When the Texas court ignored maritime law and affirmed this decision it placed Texas in conflict with established federal maritime law. If left to stand the Texas court's decision will create a variance of remedies between Jones Act cases filed in Texas state courts and those cases filed in federal courts in Texas.

I. THE TEXAS COURTS SHOULD HAVE APPLIED MARITIME LAW—THE *WILBURN BOAT FACTORS*

State courts have concurrent jurisdiction with the federal courts over maritime actions. 28 U.S.C. § 1333. A state court's choice of law is, however, constrained by the "reverse-*Erie*" doctrine, which requires that the substantive remedies afforded by the states conform to governing federal

maritime standards. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1986); *see also, Texaco Refining and Marketing, Inc. v. Estate of Dau Van Tran*, 808 S.W.2d 61, 64 (Tex. 1991), *cert. denied*, 502 U.S. 908 (1991).

Allemand's Jones Act and maritime negligence claims were tort claims governed by maritime law. Marine Fueling's recoupment claim was premised upon the substantive maritime law holding that an injured seaman's employer may recoup from third parties sums expended for maintenance and cure. *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008 (5th Cir. 1994); *In re; Liberty Seafood, Inc.*, 38 F.3d 755 (5th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995). What constitutes maintenance and cure is a substantive issue peculiar to maritime law. 8 BENEDICT ON ADMIRALTY § 5.02[A][5] (1998). Since the amount of money recoupable by Marine Fueling and its maritime insurors was peculiarly constrained by substantive maritime law, it follows that the subsidiary question of how the recouped money is divided between Marine Fueling's subrogated maritime insurors must also be constrained by substantive maritime law.

In *Wilburn Boat v. Fireman's Fund*. this Court set out the factors relevant to the choice of law questions involving admiralty cases. In order for state law to apply to this recoupment issue, three factors must exist; (1) there be no applicable admiralty rule; (2) local and state interests predominate; and (3) the uniformity principle not be crucial. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.* In the instant case, the following factors exist: (1) applicable admiralty rules concerning maintenance and cure, i.e. *Calmar* and *Fitzgerald*; (2) no state interests predominate here—Sphere Drake is a London maritime underwriter and Royal is a U.S. insurance company writing maritime excess policies; and (3) uniformity is critical to this issue, i.e. artificial future cure

characterizations in maritime settlements would undermine the proportionate share rule. None of the *Wilburn Boat* factors are present in the instant case.

The Texas courts wrongly decided this case because they failed to apply federal maritime law. *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994), citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917).

II. *FITZGERALD V. UNITED STATES LINES* — FUTURE CURE IS SUBSUMED BY A JONES ACT SETTLEMENT

Allemand was a seaman, and pursuant to federal maritime law he was entitled to seek damages from Marine Fueling and the Hose defendants. Allemand sued for and eventually recovered Jones Act and general maritime damages in excess of $18.0 million. These damages compensated him for (i) pre-judgment loss of wages; (ii) future loss of earning capacity; (iii) past and future medical expenses; (iv) any other economic losses; (v) physical pain and suffering, including physical disability, impairment, inconvenience, and the effect of the injury on normal activities and pleasures of life; and (vi) mental anguish, including humiliation, worry and concern about economic insecurity resulting from the injury. 8 BENEDICT ON ADMIRALTY § 5.02[A][4] (1998). Royal's future cure outlay must be viewed in the context of Allemand's general damage recovery.

Maritime law holds that a seaman cannot double-recover any damages, and that cure is not owed where general damages are available. *Gooden v. Sinclair Refining Co.*, 378 F.2d 576 (3rd Cir. 1967); *see also*, *Crooks v. U.S.*, 459 F.2d 631, 633 (9th Cir. 1972); *Vickers v. Tumey*, 290 F.2d 426, 434-45 (5th Cir. 1961); and *Smith v. Lykes*

Brothers-Ripley S.S. Co., 105 F.2d 604, 609 (5th Cir. 1939), *cert. denied*, 308 U.S. 604 (1939). In May 1996, Allemand received $2.8 million from Marine Fueling in return for releasing his Jones Act claim. Once Allemand agreed to the Jones Act settlement he had no right to claim future cure from Marine Fueling because his future cure claim *was* subsumed in and by his $2.8 million Jones Act settlement and the additional $15.0 million plus maritime negligence settlement he received from the Hose defendants.

This Supreme Court has long recognized the basic principle that maintenance and cure damages are subsumed by a seaman's general damage recovery. In *Fitzgerald*, the Court stated:

> Although remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures, they nevertheless, when based on one unitary set of circumstances, serve the same purpose of indemnifying a seaman for damages caused by injury, depend in large part upon the same evidence, and involve some identical elements of recovery.

As a result,

> ...when an injured seaman recovers full damages in an action for indemnity based upon unseaworthiness and negligence in which he has claimed loss of wages including the value of the board and lodging which form part thereof and medical expenses, if any, he has thereby recovered the maintenance and

> cure to which he is entitled up to the time of trial, at least.

Fitzgerald v. United States Lines, Id. at 18.

Federal maritime decisions are uniform in holding that a seaman cannot have both general maritime damages and maintenance and cure if there would result a duplication of recovery upon a single claim. *Smith v. Lykes Brothers-Ripley S.S. Co., supra*; *Muise v. Abbott*, 160 F.2d 590 (1st Cir. 1947); *Bartholomew v. Universe Tankships, Inc.*, 279 F.2d 911 (2nd Cir. 1960); *Seely v. City of New York*, 24 F.2d 412 (2nd Cir. 1928); *The Jefferson Myers*, 45 F.2d 162 (2nd Cir. 1930); *Mystic Terminal Co. v. Thibeault*, 108 F.2d 813 (1st Cir. 1940).

The Texas court's holding is wrong because it ignores substantive maritime law, which holds that Marine Fueling had no future cure obligation to Allemand once Allemand received monies for future damages in his Jones Act and maritime negligence settlements. If Marine Fueling had no further cure obligation, Royal, on behalf of Marine Fueling, had no legal reason to create the extraordinarily large future cure outlay.

III. *CALMAR S.S. CORP. V. TAYLOR—NO EXTRAORDINARILY LARGE AWARD OF FUTURE CURE IS AVAILABLE UNDER MARITIME LAW*

The Texas court's ruling permitting Royal to assert a subrogation claim for Marine Fueling's $1.0 million in unclaimed, uncalled for, and unaccrued "future cure" outlay also contravenes the United States Supreme Court decision of *Calmar S.S. Corp. v. Taylor*. In *Calmar*, the Supreme Court stated:

The award of a lump sum in anticipation of the continuing need of maintenance and cure for life or an indefinite period is without support in judicial decision. Awards of small amounts to cover future....cure of a kind and for a period definitely ascertained or ascertainable have occasionally been made. *The Mars*, 3 Cir., 149 F. 729, 730; *Wilson v. Manhattan Canning Co.*, D.C., 205 F. 996, 997. But the award here seems to us to be inconsistent with the measure of the duty and the purposes to be effected by its performance. The duty does not extend beyond the seaman's need. *Raymond v. The Ella S. Thayer*, D.C., 40 F. 902, 903; *The J.F. Card*, *supra*, D.C., 43 F.92, at page 95; *The Bouker No. 2*, *supra*, 2 Cir., 241 F. 831, at page 835; *The Santa Barbara*, 2 Cir., 263 F. 369, 371; *Stewart v. United States*, D.C., 25 F.2d 869, 870; *Marshall v. International Mercantile Marine Co.*, 2 Cir., 39 F.2d 551, 553; *Cf. Holt v. Cummings*, 102 Pa. 212, 48 Am. Rep. 199; *contra, Reed v. Canfield*, *supra*. The amount and character of medical care which will be required in the case of an affliction, as well defined even as Buerger's disease, cannot be measured by reference to mortality tables. Moreover, courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service. *The Bouker No. 2*, *supra*, 2 Cir., 241 F. 831, at page 835; *Marshall v.*

> *International Mercantile Marine Co., supra*, 2 Cir., 39 F.2d 551, at page 553, and cases cited. Furthermore, a duty imposed to safeguard the seaman from the danger of illness without succor, and to safeguard him, in case of illness, against the consequences of his improvidence, would hardly be performed by the payment of a lump sum to cover the cost of medical attendance during life.

Calmar, 303 U.S. at 530-531 (*emphasis added*). *Accord*, *Lirette v. K&B Boat Rentals, Inc.*, 579 F.2d 968 (5th Cir. 1978); 1B BENEDICT ON ADMIRALTY § 48 at pp. 4-35 (1998).

Royal could not artificially allocate $1.0 million of Marine Fueling's $2.8 million general negligence settlement to "future cure" because at the time of the payment Allemand did not need and was not requesting any $1.0 million lump-sum future cure payment. The Texas court's decision affirming Royal's $1.0 million future cure payment directly contravenes *Calmar* because it allows an excess insuror to utilize a settlement recital as a means to artificially make an extraordinarily large future cure outlay as a means to recover monies Royal paid to settle Allemand's Jones Act claim against Marine Fueling.

IV. ROYAL'S FUTURE CURE SETTLEMENT WAS NOT FOR CURE

Taken together, *Calmar* and *Fitzgerald* stand for the proposition that Marine Fueling did not have a future cure obligation to Allemand because Allemand recovered $18.0 million plus in general maritime damages. If Allemand had no right to claim future cure, then Marine Fueling had no obligation to pay future cure. If Marine Fueling had no

obligation to pay future cure, then Royal's recital that $1.0 million of Marine Fueling's $2.8 million maritime negligence settlement was for future cure must be disregarded, as a matter of maritime law. This is what the Texas trial court did and what the Texas appellate courts undid. The future cure paid by Royal was not the result of a claim for needed cure by Allemand, but a Royal ruse intended to undermine Sphere Drake's proportionate interest in the recouped maintenance and cure monies.[1]

If allowed to stand, the Texas court's opinion legitimates a maritime employer's excess insuror settling a Jones Act claim by characterizing a large portion of the settlement monies as future cure, thereby creating a recoupment right against its joint tortfeasor to the extent of the future cure outlay. Query: Had Marine Fueling characterized the entire Allemand settlement as future cure, could it have maintained a recoupment claim for this entire amount against the Hose defendants? According to the Texas courts, yes; according to *Fitzgerald*, *Calmar* and *Boca Grande*, no.

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[1] That the $1.0 million future cure settlement was in fact artificial is judicially admitted by both Royal and Allemand's attorney. Allemand's attorney stated: "I concluded a settlement with Marine Fueling Service on behalf of Mr. and Mrs. Allemand. The total amount of the settlement was $2.8 million. It made no difference to me how the $2.8 million was characterized. The ultimate decision to characterize $1.0 million as future cure and $1.8 million as employer negligence was made by Marine Fueling's attorneys. I treated the $2.8 million amount as a lump-sum settlement." Royal's appellate brief stated: "Sphere Drake questions the motives for the parties' designation of $1,000,000.00 as future maintenance and cure. *A successful tactical maneuver by Marine Fueling's attorneys to insure a reasonable recovery from the third-party tortfeasors should have no bearing on how that recovery is disbursed.*" Royal's Court of Appeals Reply Brief, p. 13 (*emphasis added*).

V. WHY ROYAL ARTIFICIALLY PAID THE FUTURE CURE

Prior to Allemand settling his Jones Act case, Royal had paid $131,076.58 of the $1,065,072.37 that Allemand had received in maintenance and cure. Royal paid Allemand $2.8 million to settle his Jones Act case against Marine Fueling. Royal had no right whatsoever to recover any of its $2.8 million Jones Act settlement. *Boca Grande Club, Inc. v. Florida Power & Light Co.* To circumvent *Boca Grande*, Royal artificially allocated the $1.0 million as future cure because of the "last in, first out" subrogation language in its excess policy. The subrogation provision in Royal's excess policy stated, in part:

> The apportioning of any amount which may be so recovered shall follow the principle that any interests (including the Assured) that shall have paid any amount over and above any payment hereunder, shall first be reimbursed up to the amount paid by them; the Underwriters are then to be reimbursed out of any balance then remaining up to the amount paid hereunder; lastly, the interests to claim the residue, amounts shall be apportioned between the interest (including the Assured) concerned in the ratio of their respective recoveries as finally settled.

This policy provision allowed Royal to claim that the "last in, first out" subrogation language applied to the $1.0 million future cure outlay. Royal could then claim that by virtue of its policy subrogation language it was entitled to recover the first $1,131 million of any maintenance and cure outlay recouped by Marine Fueling. Marine Fueling recouped $1,060,000.00, or about 97% of the actual

maintenance and cure outlay. In reversing the trial court the Texas appellate court ruled that Royal could add its $1.0 million artificial cure outlay to the $131,076.58, which Royal had really expended toward Allemand's maintenance and cure.

Sphere Drake funded 87.2% and Royal funded 12.8% of Marine Fueling's actual maintenance and cure outlay. This outlay occurred prior to Allemand's Jones Act and third party settlement. At the expense of Sphere Drake, Royal disregarded *Fitzgerald* and *Calmar*, and in essence circumvented *Boca Grande*. The result is a Texas court ruling allowing Royal to recover all of Marine Fueling's $1.06 million in recouped maintenance and cure monies despite the fact that it only funded $131,076.58 - 12.8% - of Marine Fueling's maintenance and cure outlay.[2]

VI. ANY ARTIFICIAL CHARACTERIZATION OF SETTLEMENT FUNDS AS FUTURE CURE UNDERMINES THE CERTAINTY NECESSARY FOR A MARITIME INSUROR TO DEFINE A RISK

Sphere Drake, as the primary insuror, provided $1.0 million in maritime coverage to Marine Fueling. Sphere Drake's primary coverage included Marine Fueling's maintenance and cure obligations. Marine Fueling's maintenance and cure liabilities are *no-fault* maritime

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[2] Had Royal not artificially designated $1.0 million of its $2.8 Jones Act settlement with Allemand as future cure, the dispute between Royal and Sphere Drake would be *de minimis*. Out of the recouped $1.06 million Royal would have received either $129,458.00 based upon an 87.2/12.8 pro rata allocation of monies contributed to Marine Fueling's maintenance and cure outlay prior to the Jones Act settlement, or Royal would have received $131,076.58 as per its "last in, first out" policy language.

obligations. *Vaughan v. Atkinson*, 369 U.S. 527 (1962), *rehearing denied*, 370 U.S. 965 (1962). Sphere Drake's no-fault coverage extended to any claim for maintenance and/or cure that a Marine Fueling employee had, regardless of fault. By its very nature, Sphere Drake's $1.0 million coverage would include the vast majority of claims against Marine Fueling by its employees. Sphere Drake's primary policy contemplated the limited recoupment right arising out of maintenance and cure claims, and relied on the uniformity of maritime decisions to protect this substantive right. Royal's maritime excess policy inherently contemplated that it would rarely be called upon to fund a no-fault cure claim because maintenance and cure claims rarely exceed $1,000,000.00. Royal's maritime excess policy also contemplated that a maritime excess liability insuror has virtually no subrogation rights because under the proportionate share rule the insured has no contribution rights against its fellow tortfeasors. *McDermott, Inc. v. AmClyde*; *Boca Grande Club, Inc. v. Florida Power & Light Co.*

Maritime insurors write coverages that take into account established principles of maritime law. The proportionate share rule and a maritime employer's limited right to recoup its maintenance and cure outlay are two well established maritime principles that are uniformly applied in all maritime cases. Royal's conduct disrupts the certainty that these principles stand for. Under maritime law, neither a maritime employer nor its insuror could recoup maintenance and cure monies if the recovery was predicated on an extraordinarily large artificial outlay of the recouped monies. The Texas court ruling allowed a maritime excess insuror to recoup its Jones Act settlement outlay by artificially characterizing its Jones Act outlay as a future cure outlay.

The Texas court ruling leads to a topsy-turvy world of maritime settlements. If, in Texas, a maritime employer's recital can have the effect of creating a false contribution right allowing *Boca Grande* to be circumvented, then a third party defendant could attempt to preempt or retaliate by concocting settlement recitals which specifically omitted medical care, thereby leaving open a seaman's right to pursue his employer in a no-fault lawsuit seeking future cure, thereby circumventing *Fitzgerald*. The resulting turmoil would create uncertainty in Texas maritime litigation and give rise to a plethora of settlement-recital litigation, pitting maritime defendants and their insurors against one another. This variance in remedies is exactly what this Court's maritime opinions have sought to avoid. *Miles v. Apex*, 498 U.S. 19, 26 (1990).

PRAYER FOR RELIEF

The Texas coast is a magnet jurisdiction for Jones Act litigation. The Texas decision is irreconcilable with the current body of maintenance and cure law, and if this Court allows it to remain on the books maritime settlements in Texas face an uncertain future.

Sphere Drake Underwriting Management, Ltd. seeks that this Court grant this petition for writ of certiorari to the Texas Supreme Court, thereby setting aside the Texas court ruling that allowed an excess insuror to artificially allocate Jones Act settlement monies as a future cure outlay.

Respectfully submitted,

THE REAUD LAW FIRM

Geo. Michael Jamail
State Bar No. 10535500
Counsel of Record
801 Laurel Street
P.O. Box 26005
Beaumont, TX 77720-6005
(409) 838-1000
(409) 813-1325 - Facsimile

Counsel for Petitioner,
Sphere Drake Underwriting
Management Ltd.

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APPENDIX A

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(512) 463-1312

October 12, 2000

Mr. Alan G. Sampson
Benckenstein & Oxford
P. O. Box 150
Beaumont, TX 77704-0150

Mr. George Michael Jamail
Reaud Law Firm
P.O. Box 26005
Beaumont, TX 77720-6005

Mr. Cecil L. Solomon
Billings & Solomon
2777 Allen Parkway, Suite 460
Houston, TX 77019-2129

RE: Case Number 99-1312
Court of Appeals Number: 09-97-00485-CV
Trial Court Number: A-152,286-B

Style: SPHERE DRAKE UNDERWRITING MANAGEMENT
v.
ROYAL INSURANCE COMPANY OF AMERICA

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review as corrected in the above styled case.

Sincerely,

John T. Adams, Clerk

by Gena Pelham
Gena Pelham, Deputy Clerk

cc: Ms. Carol Anne Flores, Clerk
Mr. John S. Appleman, Clerk

APPENDIX B

Court of Appeals
State of Texas
Ninth District

CHIEF JUSTICE
RONALD L. WALKER

CLERK
CAROL ANNE FLORES

JUSTICES
DON BURGESS
EARL B. STOVER

OFFICE
SUITE 330
1001 PEARL ST.
BEAUMONT, TEXAS 77701
409/835-8402 Fax 409/835-8497

November 18, 1999

Alan G. Sampson
Benckenstein & Oxford
PO Box 150
Beaumont, Tx 77704-0150

C.L. Solomon
Billings & Solomon
2777 Allen Pkwy Ste 460
Houston, Tx 77019-2129

George Michael Jamail
Reaud Law Firm
P.O. Box 26005
Beaumont, TX 77720-6005

RE: Court of Appeals Number: 09-97-00485-CV
Trial Court Case Number: A-152286-B

Style: Royal Insurance Company of America
v.
Sphere Drake Underwriting Management Ltd.

The Appellee's Second Motion for Rehearing in the above styled and numbered cause was overruled this date.

Sincerely,

CAROL ANNE FLORES,
Clerk

APPENDIX C

ROYAL INSURANCE COMPANY OF AMERICA, Appellant,
v.
SPHERE DRAKE UNDERWRITING MANAGEMENT, LTD.
Appellee.

No. 09-97-485 CV.

Court of Appeals of Texas,
Beaumont.

Submitted May 27, 1999.
Decided Sept. 30, 1999.

In suit against employer to recover for maintenance and cure, employer brought cross-claim against and reached settlement with third-party tortfeasors. Primary and excess protection and indemnity (P&I) insurers, as intervenors, filed motions for summary judgment seeking subrogation. The Fifty-Eighth District Court, Jefferson County, James Mehaffy, J., entered summary judgment in favor of primary insurer. Excess insurer appealed. The Court of Appeals reversed and remanded, 997 S.W.2d 432. Primary insurer petitioned for review. The Court of Appeals, Burgess, J., held that: (1) dispute between insurers was governed by state contract law rather than maritime law; (2) recoupment of maintenance and cure provided to employee was not limited to that provided prior to settlement; and (3) employee's recovery of personal injury damages did not preclude continued recovery of maintenance and cure.

Motion denied.

1. Admiralty 1.20(2)

Dispute between primary and excess protection and indemnity (P&I) insurers, as intervenors in suit against employer to recover for maintenance and cure, regarding which insurer's subrogation provision took precedence with respect to amounts that employer recouped from third-party tortfeasors, was governed by state contract law rather than maritime law.

2. Indemnity 13.2(7)

Maritime employer's suit against third-party tortfeasors for recoupment of maintenance and cure provided to employee was not limited to the actual maintenance and cure outlay expended by employer prior to settlement with employee, but rather included maintenance and cure expended after settlement.

3. Seamen 11(1)

Employee's recovery of damages for his injuries did not preclude continued recovery of maintenance and cure from his maritime employer, in absence of any duplication of recovery.

C.L. Solomon, James C. Bollom, Billings & Solomon, Houston, for appellant.

George Michael Jamail, Reaud Law Firm, Beaumont, for appellee.

Before WALKER, C.J., BURGESS and STOVER, JJ.

OPINION ON MOTION FOR REHEARING

DON BURGESS, Justice.

Upon motion for rehearing, Sphere Drake makes several contentions we wish to address.

[1] First, Sphere Drake contends our application of Texas contract law was incorrect. The basis of Sphere Drake's contention is that because Allemand's claim against Marine Fueling and the third-party tortfeasors was a maritime tort, the allocation of the recouped monies is governed by maritime law. Neither Allemand nor Marine Fueling are parties before this court in this action. The only parties before this court are two of Marine Fueling's insurers; the only issue is which insurance company's subrogation provision takes precedence. Sphere Drake cites *General Chemical Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex.1993), for support. In that case, General Chemical argued, and the Texas Supreme Court agreed, that maritime law, and not state law, controlled the case. *Id.* at 919. The suit was a products liability case brought by the parents of deceased shrimp fishermen. *Id.* at 917. The jury was asked, without objection, to determine damages which are recoverable under state law but not under federal maritime law. *Id.* The court held that state law applies because maritime law, although properly invoked, was waived. *Id.* The court noted that

> [p]ursuant to the `savings to suitors' clause of 28 U.S.C. § 1333, state courts have concurrent jurisdiction with the federal courts over maritime actions, constrained by the "reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.' *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174 (1986); *see also*

> *Texaco Ref. and Mktg., Inc. v. Estate of Dou Van Tran*, 808 S.W.2d 61, 64 (Tex.), *cert. denied*, 502 U.S. 908, 112 S.Ct. 301, 116 L.Ed.2d 245 (1991). Thus, maritime law does not affect a court's jurisdiction over the claim, it merely dictates the substantive law that governs that claim's resolution....

Id. at 920.

In *General Chemical*, it was the claims of the deceased's families which were found to be governed by maritime law (had that issue not been waived). We therefore agree that Allemand's claims would be governed by maritime law, were they before this court. The only matter before this court is Sphere Drakes' dispute with Royal over which insurance company recovers monies recouped from a third-party tortfeasor—not a maritime matter. Unlike *General Chemical*, the facts of this case do not "come within the purview of maritime law." *Id.*

[2] Sphere Drake next claims we erred because Marine Fueling (Royal) had no future maintenance and cure obligation to Allemand. Citing *In re Liberty Seafood, Inc.* 38 F.3d 755 (5th Cir. 1994), and *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008 (5th Cir. 1994), Sphere Drake contends "[a]miralty law limits a maritime employer's suit for recoupment of maintenance and cure to the actual maintenance and cure outlay expended by the employer prior to any Jones Act settlement."

In *Liberty*, the injured seamen's employer, Herndon, was required to pay maintenance and cure after Liberty's vessel drifted into Herndon's anchored vessel. *In re Liberty Seafood*, 38 F.3d at 756. Herndon filed claims against Liberty for indemnity and contribution for maintenance and cure and for the costs of defending actions brought by the seamen and damages resulting from the loss of use of, and damage to, Herndon's vessel. *Id.* at 757. Liberty settled with the three seamen prior

to trial. *Id.* Liberty then moved to dismiss Herndon's claims for indemnity and contribution on the basis that Herndon could not claim contribution from a joint tortfeasor because Liberty had settled with the seamen. *Id.* The district court agreed and granted Liberty's motion. *Id.* The Fifth Circuit reversed. *Id.* at 759.

The court noted that "maritime law provides two separate lines of recovery for an injured seaman; damages, and maintenance and cure." *Id.* at 758. The court then recognized

> [t]he damage claim may be brought against the employer and a third-party tortfeasor. In turn, through indemnity or contribution, the employer may recover from the third-party tortfeasor for part or all of any damages assessed against the employer. Thus, in a maritime collision, a third-party tortfeasor faces two distinct claims by a shipowner for contribution or indemnity: (1) for damages assessed against the shipowner; and (2) for maintenance and cure. As stated, *Bertram* holds that a settlement by the third-party with an injured seaman on the damage claim will not bar the shipowner's recovery of maintenance and cure.

Id. (citation omitted). The court then concluded that Herndon had a claim against Liberty for maintenance and cure.

Sphere Drake's claim that *Liberty* and *Bertram* limit the employer's suit for indemnity and contribution "to the actual maintenance and cure outlay expended ... prior to any Jones Act settlement" is therefore clearly erroneous. The Fifth Circuit in *Liberty* explicitly held that Herndon (the employer) had a claim for indemnity and contribution for maintenance and cure *after* the Jones Act settlement between Liberty and the injured seaman occurred.

[3] Sphere Drake further argues that "[o]nce Allemand recovered any money pursuant to his Jones Act or maritime negligence claims, he could no longer recover maintenance and cure from Marine Fueling." Sphere Drake cites *Gooden v. Sinclair Refining Co.*, 378 F.2d 576 (3rd Cir. 1967); *Crooks v. U. S.*, 459 F.2d 631, 633 (9th Cir. 1972); *Vickers v. Tumey*, 290 F.2d 426 (5th Cir.1961); and *Smith v. Lykes Bros.*, 105 F.2d 604,607 (5th Cir. 1939), for support. We first note that the far more recent cases of *Liberty* and *Bertram*, which are from the Fifth Circuit, clearly recognize "two separate lines of recovery for an injured seaman: damages, and maintenance and cure." *In re Liberty Seafood*, 38 F.3d at 758. *See also Bertram*, 35 F.3d at 1013.

In *Smith*, the court found the injured seaman had a cause of action to recover maintenance and cure, as well as a cause of action for his personal injury, "but he did not have the right to be compensated twice for the same elements of damage." *Smith*, 105 F.2d at 606. The court noted, "[h]is reasonable expenses of maintenance and cure might have been recovered in the form of indemnity in the action at law, but the evidence in the former case is not before us, and we do not know what items were proven or awarded therein." *Id.* The court concluded the record did not establish any "duplication or overlapping of the same elements of expense resulting from one and the same injury" existed and therefore the lower court erred in dismissing the action. *Id.*

The court in *Crooks*, 459 F.2d at 633, stated "[t]he obligation of maintenance and cure has.... traditionally been subject to the limitation that the seaman is not entitled to double recovery ....No matter what the basis of the shipowner's obligation, ...lost wages cannot be recovered more than once. Nor can the cost of maintenance and cure."

In *Vickers*, 290 F.2d at 434, the court determined that while loss of wages as an element of damages may extend indefinitely, "that is not so with regard to this limited duty to pay wages as a part of cure." The court found that while the element of wages was inherent "in each of the two types of recoveries, there must not be a duplication in the final award...." *Id.* at 435.

In *Gooden*, a seaman was injured aboard a Texaco vessel. He later secured employment on a vessel owned by Sinclair. *Gooden*, 378 F.2d at 578. The sole issue on appeal was whether Texaco had to reimburse Sinclair the judgment rendered against Sinclair for maintenance and cure. *Id.* at 579. Texaco argued that its obligation to pay the seaman maintenance and cure terminated upon his subsequent service with Sinclair. *Id.* But, the court noted, the obligation to provide maintenance and cure continues until maximum medical recovery has in fact been achieved. *Id.* The court then found that the seaman was entitled to maintenance and cure from either Sinclair or Texaco or both, but could not obtain double compensation for a single maintenance and cure claim as a result of having rights against two shipowners. *Id.* at 580. The court then summarizes to say, "[i]n other words, a seaman cannot have both damages and maintenance and cure if there would result any duplication of recovery upon a single claim." *Id.* at 581.

Sphere Drake relies upon the very next segment of *Gooden* wherein the court states, "[w]hen a seaman in the same suit proceeds against one party for damages and against another for maintenance and cure, this prohibition against double recovery has given rise to the problem whether liability for damages is primary with responsibility for maintenance and cure being only secondary. In such cases, the courts have sensibly placed the primary liability upon the party which has violated a

duty owed the seaman, the maintenance and cure claim being payable only if recovery for damages is not obtainable." *Gooden*, 378 F.2d at 581.

Taken out of context, the last phrase would seem to support Sphere Drake's position, namely that an injured seaman "cannot recover on both a personal injury and a maintenance and cure claim." But as the statement immediately preceding provides, *Gooden* does not hold that a seaman cannot recover on both claims. Rather, *Gooden* holds that a seaman cannot recover on both claims *if* any duplication of recovery upon a single claim would result. *Id.*

Likewise, *Smith*, *Crooks*, and *Vickers* all found there must be no *duplication* of recovery, none held the injured seaman could not recover upon both claims. *Smith*, 105 F.2d at 606; *Crooks*, 459 F.2d at 633; and *Vickers*, 290 F.2d at 435. *Smith* in particular turned upon the fact that the record before the reviewing court did not establish duplication or overlapping of the same elements of expense; as is the case here. Sphere Drake did not provide the trial court with any summary judgment evidence of duplication of recovery and refers this court to none on rehearing.

Next, Sphere Drake points out that "Texas courts do not favor any type of attorney contrived `settlements' which mischaracterize the settlement monies...." We do not disagree. However, as we noted in our original opinion, the record contains no summary judgment evidence of mischaracterization. Contrary to Sphere Drake's contention, statements made by attorneys in their briefs do not, and cannot, establish anything as a matter of law. Simply put, the record before this court contains no evidence establishing as a matter of law the settlement agreement was, in fact, a sham and we decline to reach that conclusion solely upon the argument of counsel.

Sphere Drake further claims we erred in determining Sphere Drake had the burden to establish Royal's outlay for future maintenance and cure was not a real obligation. Sphere Drake argues that instead Royal had the burden to prove its designation for future maintenance and cure was legitimate. Sphere Drake provides no authority for this contention and absent any evidence to the contrary, we are reluctant to go behind the face of the agreement.

For these reasons, the motion for rehearing is denied.

MOTION DENIED.

WALKER, C.J., dissents.

APPENDIX D

ROYAL INSURANCE COMPANY OF AMERICA, Appellant,
v.
SPHERE DRAKE UNDERWRITING MANAGEMENT LTD., Appellee.

No. 09-97-485 CV

Court of Appeals of Texas,
Beaumont.

Submitted May 27, 1999.
Decided Aug. 26, 1999.

In suit against employer to recover for maintenance and cure, employer brought cross-claim against and reached settlement with third-party tort-feasors. Primary and excess protection and indemnity (P&I) insurers, as intervenors, filed motions for summary judgment seeking subrogation. The Fifty-Eighth District Court, Jefferson County, James Mehaffy, J., entered summary judgment in favor of primary insurer. Excess insurer appealed. The Court of Appeals, Burgess, J., held that excess insurer was entitled to the entire recovery after payment of the deductible.

Reversed and rendered.

1. Seamen 11(6)

Right to future maintenance and cure exists in maritime law since the benefits terminate only when maximum cure has been obtained.

2. Insurance 3516

Subrogation clauses of primary and excess protection and indemnity (P&I) insurance policies, rather than proportionate share rule, governed dispute between primary and excess insurer over amount of recovery from third-party tortfeasors.

3. Insurance 3516

Subrogation clauses of protection and indemnity (P&I) insurance policies entitled excess insurer to entire recovery from third-party tort-feasors after payment of deductible; the excess insurer's payment for maintenance and cure exceeded the recovery, the excess policy required last paid-in monies to be the first paid out, but the primary policy simply entitled the insurer to monies recovered by the insured after payment of the deductible.

C.L. Soloman, James C. Bollom, Billings & Solomon, Houston, for appellant.

George Michael Jamail, Reaud Law Firm, Beaumont, for appellee.

Before WALKER, C.J., BURGESS and STOVER, JJ.

OPINION

DON BURGESS, Justice.

Royal Insurance Company of America (Royal) appeals from a grant of summary judgment in favor of Sphere Drake Underwriting Management, Ltd. (Sphere Drake). Royal and Sphere Drake are both intervenors in the case below, wherein George Allemand and his wife, Willa, sued George's employer, Marine Fueling Service, (Marine Fueling) along with other defendants, for injuries sustained in the course and scope of his

employment. Marine Fueling had a primary protection and indemnity insurance policy with Sphere Drake in the sum of $1,000,000, and an excess insurance policy with Royal in the sum of $10,000,000.

Marine Fueling and its insurers paid to or on behalf of the Allemands a total of $3,865,072.37, plus costs of defense and prosecution of Marine Fueling's cross-claims for indemnity for a total of $3,987,065.55. Of the total amount, Marine Fueling paid a deductible of $7,500, Sphere Drake paid out $992,500, and Royal paid $2,987,065.55.

In the suit below, Marine Fueling cross-claimed against defendants Sterling Chemicals, Inc., Goodyear Tire and Rubber Co., Inc. and Triplex, Inc. These three defendants paid Marine Fueling $1,060,000 to settle the cross-claims.

Royal and Sphere Drake each filed a motion for summary judgment, claiming a superior interest in the monies recovered from Sterling, Goodyear and Triplex. The trial court denied Royal's motion and granted Sphere Drake's, awarding $7,500 (the total deductible) to Marine Fueling and the rest to Sphere to Sphere Drake and Royal on a pro-rata basis. Sphere Drake recovered 87.7% ($923,042) of the remaining $1,052,500, while Royal recovered 12.3% ($129,458). Royal appeals.

In point of error one, Royal claims the trial court erred in granting Sphere Drake's motion for summary judgment. Royal first argues that Sphere Drake's motion did not present any grounds for summary judgment; thus the judgment must be reversed. TEX. R. CIV. P. 166a (c) provides that "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." Royal provides no record reference wherein the trial court was appraised of this complaint. We have reviewed

the record and find it does not reflect that Royal, by written motion, answer or response, presented this complaint to the trial court. Accordingly, it is not grounds for reversal.

[1] Royal next contends that because its policy provides any recovery from third parties is disbursed to the subrogees in the reverse order of their payments, it is entitled to the full third-party recovery of $1,060,000. Sphere Drake argues that because the recoupment was solely for maintenance and cure, it should be disbursed to the subrogees for the maintenance and cure payments each made, according to the proportionate share rule. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994). Royal counters that even under the proportionate share rule, it is entitled to the entire amount since it paid $131,076.58 in maintenance and cure benefits and settled Allemand's claims against Marine Fueling for future care for $1,000,000. Sphere Drake contends the $1,000,000 characterized as settlement of future maintenance and cure should not be considered as part of Marine Fueling's actual maintenance and cure outlay because "there is no such concept" as "anticipated future maintenance and cure obligation" in maritime law. Sphere Drake urges that the "real outlay" of maintenance and cure monies is only the $1,065,072 that went directly to Allemand or healthcare providers.

According to the Fifth Circuit, the right to maintenance and cure benefits "terminates only when `maximum cure has been obtained.'" *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008 (5th Cir. 1994) (citing 1B Ellen M. Flynn et al., Benedict on Admiralty § 42, at 4-73 (7th ed.1993)). Both Houston Courts of Appeal have followed the Fifth Circuit finding "a seaman is entitled to maintenance and cure until the date of maximum possible cure, or the date beyond which further treatment would not improve the condition." *Maritime Overseas Corp. v. Ellis*, 886 S.W.2d 780, 795 (TEX.APP.—Houston [14th Dist.] 1994), *aff'd*, 971 S.W.2d 402 (Tex. 1998),

cert. denied —— U.S. ——, 119 S.Ct. 541, 142 L.Ed.2d 450 (1998) (citing *Johnson v. Marlin Drilling Co.*, 893 F.2d 77,79 (5th Cir. 1990)). *See also Maritime Overseas Corp. v. Waiters*, 923 S.W.2d 36, 40 (Tex. App.— Houston [1st Dist] 1995) *aff'd as modified on other grounds*, 917 S.W.2d 17 (Tex. 1996) ("A seaman is entitled to maintenance and cure until the date of maximum possible cure, when no further treatment will improve the condition."). This is consistent with the United States Supreme Court's decision in *Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 8 L.Ed.2d 88, 92 (1962), wherein the Court stated that maintenance and cure "continues until [the seaman] reaches maximum medical recovery." In *Salem v. United States Lines Co.*, 370 U.S. 31, 37-38, 82 S.Ct. 1119, 8 L.Ed.2d 313, 319 (1962), the Court considered the sufficiency of the evidence to support an award for future maintenance. Although the Court found the evidence insufficient, the Court did not question the possibility of such an award, were it properly supported by the evidence. *Id.* Clearly then, there is such a concept as future maintenance and cure in maritime law.

Sphere Drake's motion for summary judgment contains no evidence, or even an assertion, that George Allemand has obtained maximum cure or that further treatment will not improve his condition. Therefore, we are unable to find, as a matter of law, the $1,000,000 allocated as future cure is not part of Marine Fueling's actual maintenance and cure outlay.

[2] We now consider Sphere Drake's contention that the recoupment should be disbursed in accordance with the proportionate share rule set forth in *McDermott*. We find *McDermott* wholly inapplicable to the present case. In *McDermott*, the court determined the liability of non-settling defendants would be calculated based upon the jury's allocation of their proportionate responsibility, without giving credit for the settlement amount. *McDermott, Inc.*, 511 U.S. at 221, 114 S.Ct. at 1471-72, 128 L.Ed.2d at 164. *McDermott* dealt with

non-settling tortfeasors seeking a dollar for dollar credit for the settlement amount. *Id.* It did not deal with recovery as between excess and primary insurers and in no way abrogated the policies in effect between Marine Fueling and its insurers. Accordingly, we find the trial court erred in granting Sphere Drake's motion for summary judgment and disbursing the recoupment on a pro-rata basis. Point of error one is sustained.

[3] Royal's second point of error contends the trial court erred in denying its motion for summary judgment. Royal moved for summary judgment on the basis it is entitled to the entire $1,060,000 recovered from the third-party tortfeasors. We agree.

The subrogation provision in Royal's policy with Marine Fueling provides that the last paid-in monies be the first paid out. The subrogation provision of the Sphere Drake policy, on the other hand, simply provides that it is entitled to monies recovered by Marine Fueling, after the deductible is reimbursed. Contrary to Sphere Drake's assertion, the provision does not state that Sphere Drake will be paid "first." In no way does the provision indicate in what order multiple insurers will be reimbursed. Sphere Drake contends the two provisions conflict. We find they do not. Giving effect to both provisions, it is clear that after the deductible is reimbursed, the excess insurer recovers any monies it paid out; then the primary insurer recovers any monies it paid out. *See Highlands Ins. Co. v. New England Ins. Co.*, 811 S.W.2d 276, 278 (Tex. App. — San Antonio 1991, no writ), *Vesta Ins. Co.* v. *Amoco Production Co.*, 986 F.2d 981, 988 (5th Cir. 1993)(applying Texas law).

Royal's summary judgment evidence establishes it paid a total of $1,131,076.58 for maintenance and cure. As the recoupment for maintenance and cure is less than that amount, Royal is entitled to the entire recoupment. Point of error two is sustained. The judgment of the trial court is reversed and

judgment is rendered in favor of Royal in the amount of $1,052,500.

REVERSED AND RENDERED.

RONALD F. WALKER, Chief Justice, dissenting.

This brief dissent is offered for two reasons: First, I believe that any discussion of "maintenance and cure" is the classic and proverbial "red herring." This case is about insurance money paid by a primary insurer and an excess insurer and which has the superior interest in the monies recovered from third-party tortfeasors. Second, the authorities cited by the majority which applies the "last in, first out" rule, are cases dealing with and between excess carriers, not cases between primary carriers and excess carriers. The majority gives emphasis to the provisions of Royal's policy and seems to totally disregard Sphere Drake's subrogation rights as to the insured. Stated another way, Royal sells an excess policy *after the contractual fact* of Sphere's agreement with Marine. Royal's policy contains language which appropriately covers the payments of excess carriers, i.e., "last in, first out," however, to treat the primary insurer as equivalent to the excess insurer is to overreach Royal's own policy provisions. I find no case law applying "last in, first out" as between primary carriers and excess carriers, therefore I am reluctant to infringe upon Sphere's subrogation agreement with its insured. Seemingly, of the $1,060,000 recouped from the third-party tortfeasors, Royal should be entitled to $60,000 only.

APPENDIX E

NO. A-152,286-B

SPHERE DRAKE UNDERWRITING MANAGEMENT LTD.	§	**IN THE DISTRICT COURT OF**
VS.	§	**JEFFERSON COUNTY, TEXAS**
ROYAL INSURANCE COMPANY OF AMERICA	§	**58TH JUDICIAL DISTRICT**

JUDGMENT

BE IT REMEMBERED that on this date came on to be considered by the Court the Motions for Summary Judgment filed herein by **Sphere Drake Underwriting Management Ltd.** and **Royal Insurance Company of America**. These Motions for Summary Judgment are presented subsequent to a settlement and final disposition of all issues in Cause No. A-152,286 filed by George Allemand and Willa Allemand against Sterling Chemicals, Inc., Olin Corporation, Goodyear Tire & Rubber Co., Inc., Marine Fueling Service, Inc., Le Manfacturier de Granford, Triplex, Inc., and Shrieve Chemical Company.

The Court finds that **Sphere Drake Underwriting Management Ltd.** and **Royal Insurance Company of America** have properly submitted affidavits in support of their respective motions, and makes the following rulings based upon all summary judgment proof presented by the parties. Having considered this summary judgment proof, the Court is of the opinion that the Motion for Summary Judgment filed by **Sphere**

Drake Underwriting Management Ltd. should be granted, and that the Motion for Summary Judgment filed by **Royal Insurance Company of America** should be overruled.

By stipulation of **Marine Fueling Service, Inc., Sphere Drake Underwriting Management Ltd.**, and **Royal Insurance Company of America**, the $1,060,000.00 recovered by **Marine Fueling Service, Inc.** is now held in trust by **Marine Fueling**. The summary judgment proof presented by **Sphere Drake Underwriting Management Ltd**. and **Royal Insurance Company of America** is sufficient for the Court to rule on all issues raised by the parties.

It is, therefore, ORDERED, ADJUDGED and DECREED by this Court that:

1. **Marine Fueling Service, Inc.** have and recover the sum of $7,500.00 as recoupment of its deductible from the money now held in trust by **Marine Fueling**;

2. **Sphere Drake Underwriting Management Ltd.** have and recover the sum of $923,042.00 from the money now held in trust by **Marine Fueling** as its share of Marine Fueling's maintenance and cure outlay to Allemand; and

3 **Royal Insurance Company of American** have and recover the sum of $129,458.00 from the money now held in trust by **Marine Fueling** as its share of Marine Fueling's maintenance and cure outlay to Allemand.

It is further ORDERED, ADJUDGED and DECREED that any interest accumulated on the $1,060,000.00 while in

trust shall be paid to the respective parties in the ratio of their principal recoveries herein.

All costs are hereby assessed against the party incurring same.

All relief not expressly granted herein is DENIED.

SIGNED this 14th day of August, 1997.

FILED
at 1:30 o'clock p M.
AUG 15 1997
JOHN S. APPLEMAN
CLERK, DISTRICT COURT OF
JEFFERSON CO. TEXAS
BY (signed) illegible
DEPUTY

MEHAFFY
JUDGE PRESIDING